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No. 93-7659

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

LOUISE HARRIS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE STATE OF ALABAMA  
IN OPPOSITION TO CERTIORARI

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33 p12

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QUESTIONS PRESENTED FOR REVIEW

1. After the sentence phase of the trial, the petitioner's jury recommended, by a 7-to-5 vote, that she be sentenced to life imprisonment without parole. After considering that advisory verdict, in addition to all of the evidence presented at both the guilt and sentencing phases of trial, the presentence report, and the arguments of counsel, the trial court imposed the death sentence.

The issue presented is whether this Court should grant certiorari to review the petitioner's claims regarding the trial court's override of the jury's advisory verdict, when the claims do not present a federal question, when the claims were not properly raised below, when the claims are not worthy of certiorari review, and when the claims are meritless.

2. After the trial judge who had responsibility for imposing sentence in this case ordered that the petitioner receive the death penalty, the case was automatically reviewed pursuant to Alabama's capital murder statute. When it conducted its statutorily mandated review, the Alabama Court of Criminal Appeals conducted its independent weighing of the aggravating and mitigating circumstances, and held that death was the proper sentence. The Alabama Supreme Court, on certiorari review, held that the Court of Criminal Appeals correctly ruled on all sentencing issues, and affirmed the conviction and sentence.

The question presented is whether this Court should grant certiorari to review the petitioner's claims regarding appellate review of a death sentence imposed after an advisory jury recommends a life without parole sentence, when the claims were never before raised, when the claims involve only state law, when the claims are not worthy of certiorari review, and when the claims are meritless.

3. At the guilt phase of petitioner's capital murder trial, the jury was instructed without objection on the concept of guilt beyond a reasonable doubt. The question presented is whether this Court should grant certiorari to review the petitioner's claim regarding the reasonable doubt jury instruction, when the claim is being raised for the first time in this Court, when the claim is not worthy of certiorari review, and when the claim is meritless.

4. Although she never before objected to the trial court's reasonable doubt jury instruction, petitioner asserted that this case should be held pending this Court's decision in Sandoval v. California and Victor v. Nebraska. At issue is whether this Court should hold this case for any reason.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW.....	1
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	1
STATEMENT.....	4
Proceedings Below.....	4
Facts Presented at Trial.....	6
ARGUMENT.....	11
I. CERTIORARI SHOULD NOT BE GRANTED ON PETITIONER'S CLAIM THAT ALABAMA'S CAPITAL STATUTE PROVIDES NO STANDARD TO GUIDE A TRIAL COURT'S IMPOSITION OF A DEATH SENTENCE AFTER THE ADVISORY JURY RECOMMENDS A SENTENCE OF LIFE WITHOUT PAROLE.....	11
A. <u>This Court Should Deny Certiorari Because The Issue Does Not Present A Federal Question</u> .....	11
B. <u>This Court Should Deny Certiorari Because The Claims Were Not Properly Raised Below</u> .....	12
C. <u>This Court Should Deny Certiorari Because The Claims Are Not Worthy Of Certiorari Review</u> .....	13



TABLE OF CONTENTS (continued)

	<u>PAGE</u>
D. <u>This Court Should Deny Certiorari Because The Claims Are Without Merit</u> .....	14
II. CERTIORARI SHOULD NOT BE GRANTED ON THE CLAIM THAT APPELLATE REVIEW OF JURY VERDICT OVERRIDE IS INADEQUATE.....	17
A. <u>This Court Should Deny Certiorari Because It Has No Jurisdiction To Consider these claims Because They Were Never Raised Before</u> .....	17
B. <u>This Court Should Deny Certiorari Because The Issue Does Not Present A Federal Question</u> .....	18
C. <u>This Court Should Deny Certiorari Because The Claims Raised Are Not Worthy Of Certiorari Review</u> .....	19
D. <u>This Court Should Deny Certiorari Because The Claims Are Meritless</u> ....	19
III. CERTIORARI SHOULD BE DENIED ON THE REASONABLE INSTRUCTION CLAIMS.....	21
A. <u>This Court Should Deny Certiorari Because The Claim Was Never Before Raised</u> .....	22
B. <u>This Court Should Deny Certiorari Because The Issue Is Not Worthy Of Certiorari Review</u> .....	22
C. <u>This Court Should Deny Certiorari Because The Claim Is Meritless</u> .....	23
IV. THIS CASE NEED NOT BE HELD FOR ANY REASON.....	24
<u>CONCLUSION</u> .....	24
<u>CERTIFICATE OF SERVICE</u>	

TABLE OF AUTHORITIES

<u>CASE(S)</u>	<u>PAGE(S)</u>
Section 13A-5-44(c), <u>Alabama Code</u> (1975).....	1,14
Section 13A-5-45(a), <u>Alabama Code</u> (1975).....	2,14
Section 13A-5-46(a) & (g), <u>Alabama Code</u> (1975).....	2,14
Section 13A-5-47(a) & (d), <u>Alabama Code</u> (1975).....	1,14
Section 13A-5-47(3).....	3,14
Section 13A-5-49(6), <u>Alabama Code</u> (1975).....	9
Section 13A-5-51(1), <u>Alabama Code</u> (1975).....	9
Section 13A-5-53, <u>Alabama Code</u> (1975).....	3,10,18,20
Section 13A-5-55, <u>Alabama Code</u> (1975).....	18
Rule 45A of the <u>Alabama Rules of Appellate Procedure</u> .....	4,12
<u>Cage v. Louisiana</u> , 498 U.S. 39 (1990).....	22-24
<u>Ex parte Giles</u> , No. 1920375 (Ala. October 29, 1993).....	13
<u>Harris v. State</u> , No. 3 Div. 332 (Ala.Crim.App. June 12, 1994).....	5,8,21
<u>Ex parte Harris</u> , No. 1920374 (Ala. June 25, 1993).....	5

TABLE OF AUTHORITIES (continued)

CASE(S)	PAGE(S)
<u>Proffitt v. Florida</u> , 428 U.S. 242 (1976).....	13,19
<u>Sandoval v. California</u> , No. 92-9049 (March 22, 1994).....	11,22
<u>Spaziano v. Florida</u> , 468 U.S. 447 (1984).....	13,18
<u>Street v. New York</u> , 394 U.S. 576 (1969).....	18,22-23
<u>Tedder v. State</u> , 322 So.2d 908 (Fla. 1975).....	16
<u>Victor v. Nebraska</u> , No. 92-8894 (March 22, 1994).....	22-24
28 U.S.C. §1257(3).....	12

JURISDICTION

The decision of the Alabama Supreme Court affirming the petitioner's conviction and death sentence was issued on June 25, 1993. Application for rehearing was overruled by that court on October 29, 1993.

This Court does not have jurisdiction over the issues raised here because none of them were properly raised in the courts below. Additionally, as to Questions I and II in the petition, this Court does not have jurisdiction because the issues presented are ones of state law and do not raise a federal question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional and statutory provisions set out on page 2 of the petition, the following provisions are involved:

Section 13A-5-47(a) of the Alabama Code (1975) provides:

After the sentence hearing has been conducted, and after the jury has returned an advisory verdict, or after such a verdict has been waived as provided in section 13A-5-46(a) or section 13A-5-46(g), the trial court shall proceed to determine the sentence.

Section 13A-5-44(c) of the Alabama Code (1975) provides, in relevant part:

Notwithstanding any other provision of law, the defendant with the consent of the state and with the approval of the

court may waive the participation of a jury in the sentence hearing provided in section 13A-5-46.

Section 13A-5-45(a) of the Alabama Code (1975) provides, in relevant part:

The sentence hearing shall be conducted as soon as practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in section 13A-5-47(b).

Section 13A-5-46(a) of the Alabama Code (1975) provides, in relevant part:

If both parties with the consent of the court waive the right to have the hearing conducted before a jury, the trial judge shall proceed to determine sentence without an advisory verdict from a jury.

Section 13A-5-46(g) of the Alabama Code (1975) provides:

If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case. Provided, however, that, subject to the provisions of section 13A-5-44(c), after one or more mistrials both parties with the consent of the court may waive the right to have an advisory verdict from a

jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury.

Section 13A-5-47(d) of the Alabama Code (1975) provides:

Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in section 13A-5-49, each mitigating circumstance enumerated in section 13A-5-51, and any additional mitigating circumstances offered pursuant to section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.

Section 13A-5-47(e) of the Alabama Code (1975), only part of which is quoted by the petitioner and is incorrectly cited as section 13A-5-47(3) at page 2 in the petition, provides:

In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

Section 13A-5-53(b), Alabama Code (1975) provides:

In determining whether death was the proper sentence in the case the Alabama court of criminal appeals, subject to



review by the Alabama supreme court, shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Rule 45A of the Alabama Rules of Appellate Procedure provides:

In all cases in which the death penalty has been imposed, the court of criminal appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant.

#### STATEMENT

#### Proceedings Below

On May 6, 1988, the petitioner was indicted by a Montgomery County grand jury and was charged with two counts of capital murder in the shooting death of her husband, Deputy

Isaiah Harris. (R. 1063)<sup>1</sup> On July 13, 1989, the jury found the petitioner guilty of murder for pecuniary gain or pursuant to a contract for hire. (R. 1063) The jury then returned its advisory verdict, recommending that the petitioner receive a life without parole sentence; seven of the jurors recommended the penalty of imprisonment and five of the jurors recommended the death penalty. (R. 1066)

On August 11, 1989, the trial court considered all of the evidence presented, the presentence report, the contentions of the parties, and the jury's advisory verdict, and ordered that the petitioner be sentenced to death. (R. 1254)

On June 12, 1989, the Alabama Court of Criminal Appeals affirmed the capital conviction and death sentence. Harris v. State, No. 3 Div. 332 (Ala.Crim.App. June 12, 1992). On June 25, 1993, the Alabama Supreme Court affirmed the judgment of the Court of Criminal Appeals. Ex parte Harris, No. 1920374 (Ala. June 25, 1993).

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<sup>1</sup>"R. \_\_\_" refers to the page number(s) of the trial record.

### Facts Presented at Trial

The Alabama Court of Criminal Appeals set forth the facts from the guilt phase of trial in its June 12, 1989 opinion as follows:

The record indicates that the appellant was involved in an affair with Lorenzo McCarter, a codefendant, while she was married to Harris. The appellant and Harris had experienced marital problems in the past, which the victim apparently believed he had solved when he promised to buy the appellant a house. The record indicates that the appellant asked McCarter to hire someone to kill her husband. McCarter approached a co-employee about doing "the job"; however, the co-employee refused and told his supervisor about the solicitation. McCarter then approached Michael Sockwell and Alex Hood, other codefendants, to commit the offense. McCarter knew that Sockwell owned a gun. Prior to the offense, the appellant met with the three men and was shown the gun. Sockwell and Hood were paid \$100 in advance to commit the offense, with the promise that more money would be paid upon completion of the murder. The State presented evidence of the existence of various insurance policies on the victim's life, with the appellant specified as the beneficiary.

The victim, who worked the night shift as a jailer, left his home at approximately 11:00 p.m. to go to work, after being awakened by the appellant a little later than usual. Immediately after Harris left home, the appellant paged McCarter on his beeper, giving the message that her husband was leaving. There was evidence that the appellant had paged McCarter on his beeper many times in the past to arrange liaisons. When he received the message in the instant case,

McCarter was seated in Hood's car, located across the street from the entrance to the subdivision in which Harris and appellant lived. Also present in the car were Alex Hood and Freddie Patterson. Patterson was unaware of the conspiracy. Sockwell was hidden behind the hedge located at the entrance to the subdivision. Harris was driving to work in his own 1979 black Ford Thunderbird automobile. When Harris stopped at the stop sign at the entrance of the subdivision, Sockwell shot him once in the face at close range with a shotgun. As a result, the lower half of the victim's face was blown off, leaving his teeth, tongue, and "matter" from his face blown across the car. After the shot, the victim's vehicle traveled slowly across the highway and came to a stop in a ditch.

When the victim failed to arrive at work by 11:25 p.m., a co-employee telephoned his home twice and spoke with the appellant. There was testimony that the appellant offered no assistance and that her speech was slow or sluggish. Two men, returning from work, discovered the victim's body shortly after midnight and telephoned the Montgomery Police Department. After the police arrived at the scene and identified the victim, several officers of the police department and employees of the Montgomery County Sheriff's Department went to the house of the victim and the appellant to notify the appellant of the victim's death. There was testimony that, upon being notified of the victim's death, the appellant began screaming and sobbing, but she shed no tears. Moreover, she became completely calm instantly in order to answer questions. A member of the Montgomery County Sheriff's Department, who knew both the appellant and the victim, testified that she asked the appellant why she did not appear to be upset, and that the appellant responded that she and the victim had been



experiencing marital problems for some time. She also told the witness that she had engaged in several extramarital affairs, the current one being with Lorenzo McCarter. The appellant stated that she was in love with McCarter. In response to questions asked by an investigator with the sheriff's department, she responded that McCarter's car was broken down in the vicinity, and when asked if McCarter could have killed the victim, the appellant responded, "If he did kill him I didn't tell him to." At trial, McCarter elected to testify against the appellant, in exchange for the prosecutor's promise not to seek the death penalty in his case.

Harris v. State, slip op. at 2-4.

As to the evidence offered as mitigation, it was not so favorable to the petitioner as she, in all likelihood, wishes it had been, or as favorable as she alleges in her petition that it was. While it is true that the petitioner located witnesses who testified favorably about her, it is also true that those witnesses knew nothing of the petitioner's extramarital affair with her capital murder co-defendant; they knew nothing of the petitioner's association with Michael Sockwell and Alex Hood; they knew nothing of the petitioner's demand that the victim buy her a house so she would not terminate their relationship; and they knew nothing of the petitioner's repeated liaisons with McCarter that took place in her home with her children present. (E.g., R. 689-690, 692, 693, 697) In sum, the evidence offered in mitigation was not as substantial as the petitioner wished it had been.

In deciding the petitioner's sentence, the trial court carefully followed the mandates of the statute and considered the jury's advisory sentencing verdict, all of the evidence, and the presentence report. (R. 1254) The trial court found one statutory aggravating circumstance, that the capital murder was committed for pecuniary gain, §13A-5-49(6), Alabama Code (1975), and one statutory mitigating circumstance, that the petitioner had no significant history of prior criminal activity, §13A-5-51(1), Alabama Code (1975). (R. 1254-B) The court also found as non-statutory mitigation that the petitioner was a hard working, respected member of her community who was held in high regard by friends and employers. (R. 1254-C) The trial court, as mandated by Alabama statute, weighed the aggravating circumstance against the mitigating circumstances, and upon determining that the single aggravating circumstance outweighed the mitigating circumstances, imposed the death sentence. (R. 1254-D, 1256; supplemental record of March 7, 1991 at pp. 7-8) At page 5 of the petition, the petitioner erroneously states that the trial court "substituted its judgment for that of the jury." Because the trial court, not the jury, is the only sentencing authority in a capital case in Alabama, the trial court imposed the first and only sentencing judgment in this case. Thus, petitioner's statements on page 5, regarding the "practice of substituting sentencing judgments" are based on

the incorrect premise that juries in Alabama impose sentencing judgments. Moreover, the petitioner's claims on page 5 regarding the number of cases in which trial courts have imposed the death sentence after a jury recommended a life without parole sentence, and about ways in which trial courts considered (or failed to consider) jury recommendations, are not based on any record evidence and are unsupported by any citation. The State specifically denies any and all allegations that trial courts improperly sentence capital defendants.

In affirming the conviction and death sentence, the appellate courts conducted their review in accordance with the capital statute, §13A-5-53, Alabama Code (1975), which does not require further consideration or discussion of the jury's recommendation of sentence.

Finally, as to the reasonable doubt jury charge, the petitioner neglected to include two important points in her petition. First, before the trial commenced, the petitioner requested that the court instruct the jurors before opening arguments that the petitioner was presumed innocent until they were convinced of her guilt "beyond a reasonable doubt and to a moral certainty" and that a reasonable doubt existed when the jurors were not convinced "to a moral certainty" that the petitioner was guilty. (R. 1200-1203) The petitioner equated reasonable doubt with moral certainty five times in the brief

motion to the trial court regarding the pretrial jury instruction. In accordance with the petitioner's request, the trial court read the requested instructions to the venire before the jury was selected. (R. 107-112)

When the jury was later instructed on the State's burden of proof and the trial court defined reasonable doubt, the petitioner entered no objections. Moreover, the petitioner failed to raise any objection to the instruction until she filed her petition in this Court.

#### ARGUMENT

CERTIORARI SHOULD NOT BE GRANTED ON PETITIONER'S CLAIM THAT ALABAMA'S CAPITAL STATUTE PROVIDES NO STANDARD TO GUIDE A TRIAL COURT'S IMPOSITION OF A DEATH SENTENCE AFTER THE ADVISORY JURY RECOMMENDS A SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE.

The petitioner contends that Alabama's capital murder statute is unconstitutional because it permits trial courts to reject capital sentencing verdicts without reference to any articulated standard. Certiorari should be denied on this claim for at least four reasons.

A. This Court Should Deny Certiorari Because The Issue Does Not Present A Federal Question.

The petitioner claims that Alabama's capital murder statute provides for constitutionally protected jury



sentencing verdicts and that the trial court in this case erroneously imposed the death penalty after the jury recommended a sentence of life imprisonment without parole. This claim involves matters of state law only. It involves the Alabama courts' interpretation and application of the sentencing procedures in Alabama's capital statute and is therefore not proper for certiorari review. 28 U.S.C. §1257(3).

B. This Court Should Deny Certiorari Because The Claims Were Not Properly Raised Below.

The petitioner failed to raise in the trial court any issues regarding the trial court's override of the jury's sentencing recommendation. The Alabama appellate courts, therefore, could only have addressed her claims pursuant to the Alabama procedural rule, Rule 45A, A.R.A.P., and determined that no plain error occurred. The application of Alabama's plain error rule is strictly a matter of state law. A state may apply its own appellate rules of procedure and may defeat a claim based on that independent state law.

Because the petitioner's claims regarding the rejection of the jury's advisory verdict were not properly raised below, this Court has no jurisdiction to consider them and it should deny certiorari.

C. This Court Should Deny Certiorari Because The Claims Are Not Worthy Of Certiorari Review.

The petitioner's claims regarding the trial court's imposition of the death sentence after the jury recommended that she receive a sentence of life imprisonment without parole is not worthy of certiorari review. The demands on this Court's time mandate that it select for review only those few truly important cases with wide ranging impact. This is not such a case.

The propriety of the death sentence for this woman, who contracted for her husband's murder, is a fact-specific question that was carefully considered by the state courts. Review of the sentencing question is better left to those courts because it has no application beyond the unique facts of this case.

As to the claims involving the sentencing provisions of Alabama's statute, that issue, too, has been resolved by the Alabama courts and need not take up the limited time available in this Court. E.g., Ex parte Giles, No. 1920375 (Ala. October 29, 1993). As to the broader claims regarding the propriety of judicial override of jury recommendations, those issues have also been decided adversely to the petitioner. See Proffitt v. Florida, 428 U.S. 242, 252 (1976); Spaziano v. Florida, 468 U.S. 447, 457-467 (1984).



Because this case presents no issues proper for certiorari review by this Court, such review should be denied. Sup. Ct. R. 10.1.

D. This Court Should Deny Certiorari  
Because The Claims Are Without Merit.

The petitioner asserts that the jury had a constitutionally protected verdict and that it was improperly rejected without reference to any standards. None of the components of this claim has any merit.

First, the petitioner incorrectly implies that the jury in capital cases in Alabama imposes the sentence and that this verdict is constitutionally "immune" from judicial override. Alabama statute provides otherwise. The trial court, not the jury, is the sentencing authority in Alabama. §13A-5-47(a), (e), Alabama Code (1975). The statute provides that a jury may be called upon to give an advisory verdict of death or life imprisonment without parole, §13A-5-46, Alabama Code (1975), however, a jury is not required. Section 13A-5-44(c), Alabama Code (1975), provides that a defendant may waive jury sentencing, and in that case the trial judge determines sentence without an advisory verdict, §13A-5-46(a), Alabama Code (1975). The petitioner correctly notes that if a hearing is held before a sentencing jury and the jury cannot reach an advisory recommendation, the trial court may declare a mistrial. §13A-5-46(g), Alabama Code (1975). She fails to

note, however, that the same statutory provision allows for a waiver of the right to an advisory verdict from the jury, and provides for sentencing by the trial court without a jury recommendation.

Thus, while a defendant may receive a recommended sentence in a capital case, jury participation may be waived at various points in the proceeding, and the case can be submitted to the trial court - the ultimate sentencing authority - without a jury's advisory verdict. See also §13A-5-45(a), Alabama Code (1975).

Second, there is no merit to the petitioner's claims that the Alabama statute permits a trial court to override a jury's advisory verdict in a standardless and haphazard way. In determining sentence, the trial court is required to consider all of the evidence from trial and the presentence investigation report; to determine what statutory aggravating and mitigating circumstances exist; to determine what non-statutory mitigating circumstances exist; to determine whether the aggravating circumstances outweigh the mitigating circumstances; to consider the jury's non-binding sentence recommendation, if one was made; and to enter written sentence findings. §13A-5-47(d), (e), Alabama Code (1975). These are the standards provided in the Alabama capital sentencing scheme which prevent the arbitrary and discriminatory application of a death sentence and are all the standards the

Eighth Amendment requires. Simply because Alabama does not have a defined standard of review where a trial judge overrides a sentence recommendation in sentencing a defendant to death like that in Tedder v. State, 322 So.2d 908 (Fla. 1975), does not mean that a death sentence is arbitrarily imposed. Alabama's capital sentencing scheme is certainly not standardless.

Moreover, the petitioner states at page 9, "The jury's verdict is carefully guided by specific statutory requirements that direct the finding, consideration and weighing of aggravating and mitigating circumstances. Ala. Code §13A-5-46(e)(1975)." These guiding standards of which the petitioner approves are precisely the same standards that the statute imposes on trial courts. §§13A-5-47(e), 13A-5-48, Alabama Code (1975). The petitioner has implicitly conceded that the trial court's sentencing decision is guided by standards that satisfy the Constitution.

Third, the petitioner's claim that the death sentence in this case was unguided and inappropriate is also meritless. The trial court fully complied with the requirements of the sentencing provisions of the Alabama statute set forth above, including giving consideration to the jury's advisory verdict. This petitioner murdered her husband for money and/or to be rid of him so she could more easily maintain her relationship with her boyfriend. The only evidence she

offered in mitigation was "character evidence" from individuals who knew nothing of her sexual improprieties, her association with criminals, or her other negative characteristics. On the facts of this case, the trial judge's decision that death was the proper sentence was correct, and it was entered in full accord with the law.

For all of these reasons, certiorari should be denied.

## II.

CERTIORARI SHOULD NOT BE GRANTED ON THE  
CLAIM THAT APPELLATE REVIEW OF JURY  
VERDICT OVERRIDE IS INADEQUATE.

The petitioner claims that appellate review of cases in which a death sentence is imposed after a jury recommends a sentence of life imprisonment without parole is inadequate and that there is no mechanism to ensure evenhandedness. She also claims that the appellate courts reviewing her case denied her meaningful appellate review. Certiorari should be denied for at least four reasons.

### A. This Court Should Deny Certiorari Because It Has No Jurisdiction To Consider These Claims Because They Were Never Before Raised.

The petitioner has never before raised claims regarding improper appellate review of death sentences imposed following jury recommendations of life imprisonment without parole.



This Court has no jurisdiction to consider issues not raised or addressed in lower courts, Street v. New York, 394 U.S. 576 (1969), so certiorari should be denied.

B. This Court Should Deny Certiorari  
Because The Issue Does Not Present A  
Federal Question.

The claims regarding appellate review of death sentences imposed by Alabama trial courts following jury recommendations of life imprisonment without parole are matters governed by the Alabama statute. §§13A-5-53, 13A-5-55, Alabama Code (1975). The same appellate review provisions apply in cases in which death sentences were imposed following jury recommendations of death. In each category of cases, the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court, is directed to determine whether the death sentence imposed by the trial court was the proper sentence. While the ultimate sentencing result may be reviewable, the procedure used to reach that result is a state law procedure, and is not an issue for federal courts to review. Spaziano v. Florida, 46 U.S. 447, 465 (1984).

Because the claims do not raise a federal question, certiorari should be denied.

C. This Court Should Deny Certiorari  
Because The Claims Raised Are Not  
Worthy Of Certiorari Review.

The claims raised here involve the appellate review of Alabama death sentences, in general, and of the petitioner's death sentence, specifically. These claims are not worthy of certiorari review.

As to the appellate review of death sentences imposed after a jury recommends life imprisonment without parole, Alabama's sentencing scheme was upheld by this Court in Proffitt v. Florida, 428 U.S. 242, 252 (1976), so further consideration of the statute is not warranted. As to the appellate review of the petitioner's death sentence, the claims are purely fact-based and have no application beyond the scope of this case.

For these reasons, the claims are not worthy of certiorari review.

D. This Court Should Deny Certiorari  
Because The Claims Are Meritless.

The petitioner claims that appellate review of jury verdict overrides is inadequate and does not ensure evenhanded application, and that no appellate analysis of the death sentence was performed in her case. Both contentions are false.



The Alabama capital statute requires the Court of Criminal Appeals to determine whether the death sentence was imposed under any arbitrary influence, whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death is the proper sentence, and whether the death sentence is excessive or disproportionate, §13A-5-53(b), Alabama Code (1975). Review of the death sentence is guided by concise standards that apply in every case, whether the jury recommended a death sentence or a sentence of life imprisonment without parole. There is no specific provision requiring an appellate court to consider the jury's verdict, because the death sentence imposed by the trial court, the ultimate sentencing authority, is the subject of appellate review. Thus, it is understandable that the appellate court often does not refer to the jury's recommendation when it is conducting the independent weighing on the appellate level.

This review process does not lessen the consistency in the sentencing procedures mandated by the statute and followed by the trial courts. And contrary to the petitioner's statement at page 20, the review process assures

evenhandedness by imposing the same review standards on the appellate court for every death sentence it reviews.<sup>2</sup>

As to the appellate court review of the petitioner's death sentence, the Alabama Court of Criminal Appeals specifically found that the trial court considered the advisory verdict but concluded after its independent weighing that the death sentence was proper. Harris v. State, slip op. at 75, 82. The appellate court also independently weighed the aggravating and mitigating circumstances and held that death was the proper sentence. Id. at 82. The Alabama Supreme Court held that the lower court correctly resolved the issues addressed in the opinion. The appellate courts conducted the review required by Alabama statute, so no error occurred.

Certiorari should be denied on this issue.

### III.

#### CERTIORARI SHOULD BE DENIED ON THE REASONABLE DOUBT JURY INSTRUCTION CLAIMS.

The petitioner contends that the trial court's jury charge on reasonable doubt violated Cage v. Louisiana, 498

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<sup>2</sup>The petitioner states at page 20 that a capital defendant may be subject to override in one court but not another. This is patently false. Because the trial judge is the sentencing authority, every defendant is subject to override in every court.

U.S. 39 (1990). Certiorari should be denied on this claim for at least three reasons.

A. This Court Should Deny Certiorari Because The Claim Was Never Before Raised.

The petitioner raised no objection in any court below to the reasonable doubt jury instruction, and raises the claim here for the first time. This Court has no jurisdiction to consider issues not raised in the courts below. Street v. New York, 394 U.S. 576 (1969).

B. This Court Should Deny Certiorari Because The Issue Is Not Worthy Of Certiorari Review.

The petitioner challenges the trial court's jury charge on the basis of Cage v. Louisiana. Because that decision was clarified in Victor v. Nebraska and Sandoval v. California, Nos. 92-8894 and 92-9049 (March 22, 1994), and because that decision distinguishes Cage in some ways, certiorari is not warranted to compare the jury instruction in this case to the instruction in Cage. Furthermore, the petitioner's claim involves nothing more than an application of existing law to the facts of this case. It does not involve important federal questions of a wide scope that are proper matters for certiorari review.

C. This Court Should Deny Certiorari Because The Claim Is Meritless.

The petitioner's claim, that the reasonable doubt jury instruction violated Cage v. Louisiana because it did not satisfy due process and it permitted her jury to convict on an insufficient burden of proof, is meritless.

The trial court in this case instructed the veniremembers at the outset of trial in accordance with the petitioner's request that they be told, among other things, that her guilt had to be proved "beyond a reasonable doubt and to a moral certainty." (R. 1200-1203, 107-112) Not surprisingly, the petitioner did not object when the trial court instructed the jury at the close of the evidence that it must find the petitioner innocent unless it was convinced beyond a reasonable doubt and to a moral certainty of her guilt.

Apart from the fact that the petitioner entered no objection to the reasonable doubt jury instruction, her belated claims of error in this Court are not well taken. The jury charge repeatedly informed the jurors that their decision as to guilt or innocence had to be based on the evidence, and not on suspicion, guess, or surmise. (R. 919-922) This Court made it clear in Victor and Sandoval that, even though a jury instruction contains terms such as "moral certainty" and "actual, substantial doubt," there is no error as long as the charge, taken as a whole, makes it clear

to the jury that it can not convict on a standard lower than that required by due process. The jury charge here made it clear that the proof required for conviction was to be based on the evidence and had to be proof beyond a reasonable doubt of every fact necessary to prove the crime charged.

No error occurred with regard to the jury instruction, so certiorari should be denied.

IV.

THIS CASE NEED NOT BE HELD FOR ANY REASON.

The petitioner requested that this case be held pending this Court's decisions in Victor v. Nebraska and Sandoval v. California. Apart from the fact that certiorari should have been denied because no issue was ever before raised regarding the reasonable doubt instruction, this case need not be held since Victor and Sandoval have been released.

CONCLUSION

Certiorari should be denied in this case.

Respectfully submitted,

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NO. 93-7659

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

LOUISE HARRIS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE ALABAMA SUPREME COURT

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CERTIFICATE OF SERVICE FOR BRIEF IN OPPOSITION

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this 31st day of May, 1994.

All parties required to be served have been served.

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